

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EASTERN DIVISION

No. 05-10849RGS

HELEN RUNGE,

Plaintiff

v.

WALTER J. KELLY,
KERRY L. BLOOMINGDALE, M.D., and
SUNBRIDGE NURSING AND
REHABILITATION CENTER,

Defendants

Leave to File granted by order of
Court on 3/8/07

**DEFENDANT KELLY'S REPLY TO PLAINTIFF'S OPPOSITION TO
DEFENDANT KELLY'S CROSS-MOTION TO COMPEL PLAINTIFF TO
RESPOND TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

NOW COMES the Defendant, Walter J. Kelly, ("Kelly"), and submits the following in further support of Defendant's Cross-Motion to Compel Plaintiff to Respond to Requests for Production of Documents.

First and foremost, the Plaintiff's purported *Opposition to Defendant Kelly's Cross-Motion to Compel Plaintiff to Respond to Requests for Production of Documents* is moot by Order of the Court. The subject motion has already been acted upon by the Honorable Judge Stearns on 2/9/07, and the Court entered an order compelling the Plaintiff to produce the requested medical records. On 2/13/07, after the Court's clear order, Plaintiff filed her purported opposition addressing the very same issues of Plaintiff's original *Motion for Protective Order, Defendant Kelly's Opposition and Cross-Motion to Compel, and Defendant Dr. Bloomingdale's Opposition to Plaintiff's*

Motion for a Protective Order and Judge Stearns' Order granting the protective order but compelling the Plaintiff to produce the medical records.

However, should the Court reconsider its Order on these motions, the Court should at least be aware of the very relevant holding of Greenberg v. United States, 1990 U.S. Dist LEXIS 12091 (D. Mass. 1990). Plaintiff's only grounds in opposition to Defendant Kelly's motion to compel the Plaintiff to produce relevant medical records is that she is not in "control" of these records. In fact, she argues she already produced all records in her *possession*. However, in Greenberg v. United States, this Court held that the plaintiff must provide her medical records in response to Requests for Production of Documents, as she had a legal right to obtain them and could not decline to produce them on the basis that they were not in her possession, custody or control.

The circumstances of Greenberg are strikingly similar to the matter at hand. The plaintiff, Greenberg, refused to produce her medical records or to sign a release for them asserting that her own medical records were not in her possession, custody or control. See id. Defendant did not immediately move to compel the plaintiff, but rather, as in this matter, sought the medical records through subpoenas. As in the matter at hand, the Plaintiff moved to quash the subpoenas and Defendant moved to compel the Plaintiff to produce the medical records. Also as in the matter at hand, the Court allowed the motion to quash the subpoenas but allowed Defendant's Motion to Compel and ordered the Plaintiff to produce the medical records. The Court found the plaintiff's contention that her own medical records were not within her control "specious". Id., at *7. Based on this holding, and for the grounds as set forth in Defendant's Memorandum, the Plaintiff

should be compelled to produce her medical records in response to Defendant's Requests for Production of Documents.

WHEREFORE, the Defendant, Walter J. Kelly, respectfully requests that this Honorable Court allow Defendant's Cross-Motion and Compel the Plaintiff to produce the requested certified medical records.

Dated: March 8, 2007

The Defendant,

Walter J. Kelly,
By his attorneys,

s/ Michele Carlucci

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CERTIFICATE OF SERVICE

I, Michele Carlucci, certify that on March 8, 2007 I have served, by electronic filing a copy of the following:

1. Defendant Walter J. Kelly's Reply.

to all counsel of record:

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